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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 OAKLAND DIVISION

15 HO RIM KAM,

16 Petitioner,

17 v.

18 MARTIN LUTHER KING, JR.-MARCUS
19 GARVEY SQUARE COOPERATIVE BOARD
20 OF DIRECTORS,

21 Respondent.

Case No.: C 07-4414 SBA

**PLAINTIFF'S NOTICE OF
MOTION AND MOTION FOR
REMAND PURSUANT TO 28 U.S.C.
SECTION 1447; MEMORANDUM
OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFF'S
MOTION**

Date: Sept. 11, 2007

Time: 1:00 p.m.

(contingent on the accompanying
Motion to Shorten Time)

The Honorable Sandra B. Armstrong

NOTICE OF MOTION AND MOTION

23 PLEASE TAKE NOTICE that on September 11, 2007 at 1:00 p.m., or as soon
24 thereafter as the matter may be heard, before the Honorable Sandra B. Armstrong,
25 Petitioner Ho Rim Kam will and does hereby move pursuant to 28 U.S.C. Section 1447 for
26 an order remanding this action to the Superior Court of California for the County of San
27 Francisco, and – as allowed by statute - awarding just costs and any actual expenses,
28

1 including attorney fees, incurred as a result of the removal.

2 **RELIEF SOUGHT**

3 As set forth in the Notice above, Petitioner seeks an Order of immediate remand to
4 the California Superior Court, along with an Order awarding his just costs, expenses and
5 attorney's fees under 28 U.S.C. §1447.

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 This case does not belong in federal court.

9 Mr. Kam has not alleged a single federal cause of action. He brought his Verified
10 Petition for a Peremptory Writ of Mandamus against the Martin Luther King, Jr.-Marcus
11 Garvey Square Cooperative Board of Directors ("Board") pursuant to a special state law:
12 California Code of Civil Procedure § 1085, *et seq.* Nor do any of his claims arise under the
13 federal Constitution or statutes—in fact, Mr. Kam's claims are unrelated to any federal law.
14 His Petition simply asks for the mandamus relief directed by the California Legislature to
15 his precise circumstances: where a private corporate Board is attempting to exclude a duly-
16 elected Director in a manner contrary to the By-laws that govern the Board's conduct.
17 Thus, the only question presented is whether the Board's attempts are precluded by the
18 King-Garvey By-laws. This is a question of interpretation of the by-laws and application of
19 the California Corporations Code. There is no federal question jurisdiction.

20 Nevertheless, counsel purporting to act on behalf of the Board¹ has removed this
21 action asserting "federal question" jurisdiction. The Notice of Removal vaguely proposes
22 that this action "arises under United States Housing Act of 1937, 42 U.S.C. § 1437 *et seq.*
23 and its implementing regulations . . . 5 U.S.C. § 706 and arguably the Fifth Amendment,"
24

25 ¹ As we show below, we have a serious question whether the deeply divided Board
26 of this California non-profit entity, has actually voted to retain counsel, much less to seek
27 Mr. Kam's exclusion. And, indeed, current counsel has told the undersigned that she had
28 yet to meet with this "split" Board. Because Mr. Kam has obviously not been privy to
counsel's communications, however, this remains an unresolved question.

1 yet none of these authorities are cited in Mr. Kam's application, none are implicated by Mr.
 2 Kam's requested relief, and – to be blunt – none have any substantive bearing on any issue
 3 in this case. Accordingly Mr. Kam requests that this Court immediately remand this
 4 California statutory proceeding to the State Courts.

5 **I. BACKGROUND**

6 Mr. Kam is a duly-elected Director and the Treasurer for the Board. Petition for
 7 Writ of Mandamus ("Pet."), Exh. 1 to Defendant's Notice of Removal, at ¶ 6. Under the
 8 King-Garvey By-laws, a Director can only be removed in two instances: (1) by proposal
 9 and vote of the regular membership or (2) where the director is "more than thirty (30) days
 10 delinquent in payment of his carrying charges [rent]." *Id.* at ¶ 9; Kam Decl. (attached to
 11 Exh. 1 to Defendant's Notice) at Ex. N. The King-Garvey shareholders have not voted to
 12 remove Mr. Kam from the Board, and in no instance has Mr. Kam been "more than thirty
 13 (30) days delinquent." Pet. at ¶ 8. That means he cannot be removed from the Board.

14 Though Mr. Kam's Petition does not rely on any federal law or statute he did attach a
 15 letter written on March 5, 2007, by a federal employee, Angela Corcoran, the Acting
 16 Director of the Operations Division of the U.S. Department of Housing and Urban
 17 Development, San Francisco Regional Office ("HUD"). Corcoran's letter said that she had
 18 been told that Mr. Kam was delinquent in his rent to the Coop. Based upon this apparent
 19 second-hand report, she then offered her opinion that Mr. Kam "can no longer serve on the
 20 Board." Kam Decl. at Ex. D.² Ms. Corcoran also did not cite a single federal law to
 21 support her contention, which is simply an issue of the application and interpretation of the
 22 by-laws. And she herself cited only to those by-laws. *See id.* Subsequently, on March 13,
 23 2007, a three-member faction of the Board then improperly voted to remove Mr. Kam from
 24 the Board. Pet. at ¶ 8.

25 On April 26, 2007, Mr. Kam's attorneys sent a letter to the President of the Board
 26

27 ² The Redacted Declaration of Ho Rim Kam Pending Motion to File Under Seal
 28 and its attachments are properly before this Court because they are part of and incorporated
 into Mr. Kam's Petition. *See* Petition at ¶ 5.

explaining that Mr. Kam's purported removal was illegal under the King-Garvey By-laws and California's Corporations Code. *Id.* at ¶ 10; Kam Decl. at Ex. F. On July 6, 2007, a different attorney purporting to represent the Board wrote a letter asserting the "Board's" belief that Mr. Kam was properly removed. Pet. at ¶ 10; Kam Decl. at Ex. G.³ Just like the letter from Ms. Corcoran, the attorney purporting to represent the Board cited no federal law for his belief; again, he only cited the King-Garvey By-laws. Kam Decl. at Ex. G. On July 24, 2007, the same faction of the Board that voted to remove Mr. Kam wrote a letter stating that "Mr. Kam is automatically removed as a Director under the provisions in the bylaws at Article V, Section 5, and as Treasurer by vote of the Board under authority of the bylaws at Article VI, Section 3." Kam Decl. at Ex. N. For the third time, the Board-faction's letter cites no federal law. *See id.* This is purely and entirely a squabble between factions of the Coop Board over the Corporation's by-law provisions.⁴

On August 6, Mr. Kam brought his Petition for a Peremptory Writ of Mandamus under California Code of Civil Procedure Section 1085 because "[t]hat vote was illegal and in violation of the King-Garvey By-laws. . . ." Pet. at ¶ 8.⁵ He did not assert any cause of action under federal law and his petition does not rely or turn upon any federal authority.

II. AUTHORITY AND ANALYSIS

A. Remand Is Necessary Because Removal Was Inappropriate.

"If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). "The burden of establishing federal jurisdiction falls on the party invoking removal." *Harris v. Provident Life & Accident Ins. Co.*, 26 F.3d 930, 932 (9th Cir. 1994) (citation omitted). "Removal

³ This attorney was not properly retained by the Board, which to Mr. Kam's knowledge has never yet voted formally to retain any attorney. Kam Decl., ¶ 9.

⁴ Though as shown in his Petition, Mr. Kam believes that the underlying purpose of the effort to remove him was to disable his vote on a complex and critical financial issue that evenly divided the other six Board members.

⁵ Cal. Code Civ. Pro. § 1085(a) provides that "[a] writ of mandate may be issued by any court to any . . . board . . . to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such . . . board. . . .").

jurisdiction is statutory and strictly construed.” *Gould v. Mut. Life Ins. Co. of New York*, 790 F.2d 769, 773 (9th Cir. 1986). Thus, any doubts as to removability are resolved in favor of remand to state court. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941); *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).

B. No Federal Question Is Raised In The Petition.

The Board’s sole alleged basis for removal is the artfully vague assertion that a “federal question” exists because Mr. Kam’s petition “arises under United States Housing Act of 1937, 42 U.S.C. § 1437 *et seq.* and its implementing regulations . . . 5 U.S.C. § 706 and arguably the Fifth Amendment.” Notice of Removal at ¶ 3.

The Board is wrong. “Federal courts look only to a plaintiff’s pleadings to determine removability.” *Gould*, 790 F.2d at 773. “[I]t is now settled law that a case may not be removed to federal court on the basis of a federal defense” *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987). “[W]hether a case is one arising under [federal law], in the sense of the jurisdictional statute . . . must be determined from what necessarily appears in the plaintiff’s statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.” *Oklahoma Tax Commission v. Graham*, 489 U.S. 838, 840-41 (1989) (*per curiam*) (quoting *Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914)).

Mr. Kam’s well-pleaded claim is based on a special mandamus remedy created by the California Legislature. Neither his Petition, the sole basis for his Petition (California Code of Civil Procedure 1085 and relevant sections of California’s Corporations Code), nor the papers he submitted in support thereof mention any federal law, let alone any citation to, discussion of, or reference to the United States Housing Act, its implementing regulations, the Administrative Procedure Act, or the Fifth Amendment.

Nor is any substantial question of federal law presented. Federal question jurisdiction may sometimes exist where state law claims “necessarily depends on resolution of a substantial question of federal law.” *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983). But this is true only “where the vindication of a

1 right under state law necessarily turn[s] on some construction of federal law.” *Merrell Dow*
 2 *Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (citation omitted). Thus, the
 3 following three-part test applies:

- 4 1. Does the state law claim necessarily raise a federal issue?
- 5 2. Is the federal issue “actually disputed” and “substantial”?
- 6 3. Would the exercise of federal jurisdiction disturb “any congressionally
- 7 approved balance of federal and state judicial responsibilities” so as to
- 8 substantially increase the volume of federal litigation?

9 *Grable & Sons Metal Products, Inc. v. Darue Engineering.*, 545 U.S. 308, 313-14 (2005).

10 Under the first *Grable* requirement, Mr. Kam’s state law claim does not raise a
 11 federal issue. The only issue here is whether, *under the Coop By-laws (not under federal*
 12 *law)*, Mr. Kam is entitled to remain on the Board. That is not a federal issue. No federal
 13 law governs the by-laws of a California non-profit, and it is irrelevant to this case what any
 14 HUD employee thinks the King-Garvey By-laws mean. Moreover, the Board is outright
 15 wrong when it contends that Mr. Kam “protests actions taken by the Federal Government.”
 16 Notice of Removal at ¶ 4. The petition unambiguously provides that Mr. Kam does no such
 17 thing; he merely protests actions taken by the faction of the Board that attempted to exclude
 18 him in contravention of the King-Garvey By-laws. Pet. at ¶¶ 8-11.

19 Similarly, the Board is incorrect when it states that Mr. Kam seeks some relief
 20 relating to federal law or HUD. See Notice of Removal at ¶ 5. The prayer for relief
 21 expressly and unambiguously asks for “a Peremptory Writ of Mandamus, pursuant to
 22 California Code of Civil Procedure §1085, directed to the Respondent and compelling it to
 23 admit Petitioner to the use and enjoyment of all rights and privileges of a Board member of
 24 King-Garvey, to which he is duly entitled under the By-laws thereof.” *Id.* at Prayer ¶ 1.
 25 The relief Mr. Kam seeks has nothing to do with federal law and Mr. Kam has not asked for
 26 any relief against HUD.

27 Since there is no federal issue, the second *Grable* requirement is irrelevant.

28 Third, any exercise of federal jurisdiction would substantially increase the volume of

1 federal litigation. The Board basically argues that a federal question is raised any time a
 2 federal agency is involved, however tangentially, in litigation wholly under state law. That
 3 would mean, for example, that every unlawful detainer case involving Section 8 housing
 4 would be removable as a federal question. But courts—including this one—have refused to
 5 throw open the doors to the federal courts to such claims, except where there is an
 6 independent jurisdictional basis disclosed *on the face of the complaint* (such as diversity
 7 jurisdiction or that some property at issue is a “federal enclave”). *See Cooper v.*
 8 *Washington Mut. Bank*, No. C03-554 VRW, 2003 WL 1563999, at *2 (N.D. Cal. Mar. 19,
 9 2003) (remanding an unlawful detainer case); *Washington v. Municipal Court*, No. C-99-
 10 0568 MHP, 1999 WL 144870, at *2 (N.D. Cal. Mar. 12, 1999) (same). The Petition shows,
 11 however, that the parties are not diverse and there is no “federal enclave” involved. *See*
 12 Notice of Removal at ¶ 3 (alleging only federal question jurisdiction under §1331); *Swords*
 13 *to Plowshares v. Kemp*, 423 F. Supp. 2d 1031, 1034 (N.D. Cal. 2005) (defining a “federal
 14 enclave” as land acquired by the federal government pursuant to the Constitution “from the
 15 states for certain specified uses and to exercise exclusive jurisdiction over such lands, which
 16 are known as federal enclaves”).

17 Petitioner respectfully suggests that the Removal Notice here was hastily but
 18 erroneously considered as a means to disable the California Court from proceeding with
 19 expedited mandamus relief. Mr. Kam requests that the Court immediately remand this
 20 action to the California Court where it belongs.

21 **C. Request for Fees Pursuant to 28 U.S.C. Section 1447(c)**

22 “An order remanding the case may require payment of just costs and any actual
 23 expenses, including attorney fees, incurred as a result of the removal.” 28 U.S.C. § 1447(c).
 24 An award of fees under Section 1447(c) need not be supported by a finding of bad faith
 25 because the award “is not a punitive award against defendants; it is simply reimbursement
 26 to plaintiffs of wholly unnecessary litigation costs the defendant inflicted.” *Moore v.*
 27 *Permanente Medical Group*, 981 F.2d 443, 446-47 (9th Cir. 1992) (quoting *Moore v. Kaiser*
 28 *Foundation Hospital, Inc.*, 765 F. Supp. 1464 (N.D. Cal. 1991)). “[T]he decision as to

whether to award fees under § 1447(c) turns primarily, if not solely, on the merit of the removal. . . . Congress meant § 1447(c) to be a signal *that in every removal there is risk of having to pay the plaintiff's reasonable attorneys fees.*" *Gray v. New York Life Ins. Co.*, 906 F. Supp. 628, 637 (N.D. Ala. 1995).

Every gambler occasionally loses. Before he rolls the dice he knows that he might come up "snake eyes." Some gamblers, such as the removing defendants in this case, are better at assessing risk than others. A defendant's risk assessment must be intelligent as well as honest. There is no place for playing a hunch or for simply betting on which judge the case will be assigned to. . . . This is why "good faith" is not a defense to a claim for § 1447(c) fees. Defendants in the instant case took a calculated (or possibly an uncalculated) risk, presumptively understanding that they had the burden both to plead and to prove a basis for the removal and not to come up with an after-the-fact rationalization.

Id. Here, removal was without foundation. Even a cursory reading of Mr. Kam's Petition reveals that this Court has no original jurisdiction. Accordingly, Mr. Kam respectfully requests an award of costs and expenses. If allowed, Mr. Kam will submit a bill of costs and expenses upon the issuance of the Court's remand.

III. CONCLUSION

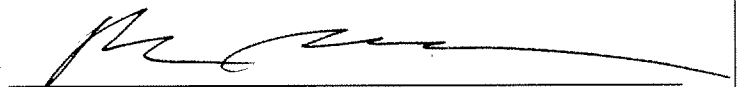
Mr. Kam requests that the Court remand this action to the San Francisco County Superior Court and award him the costs and expenses incurred as a result of the removal.

August 31, 2007

Respectfully submitted,

HELLER EHRMAN LLP

By



Robert E. Borton

Attorneys for Petitioner HO RIM KAM